(1928) 07 AHC CK 0026

Allahabad High Court

Case No: None

Ramgopal		APPELLANT
	Vs	
Tulshi Ram and Another		RESPONDENT

Date of Decision: July 3, 1928

Hon'ble Judges: Boys, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Boys, J.

This case has been referred to this Fall Bench for determination of certain questions relating to the law governing "family arrangements". On the death of one Nathua in the first quarter of the year 1924, an application for mutation was made by Ramgopal, the present plaintiff-appellant, a first cousin of Nathua. On 31st March 1924 objections were filed by Tulshi Ram, Munshi Lal and Duli Chand, grandsons of Ramgopal''s great-uncles. Their objection took the form of an allegation that Ramgopal''s father had been adopted into another branch of the family and Ramgopal had, therefore, lost all right to succeed to Nathua''s property. On 24th April 1924 Ramgopal and the three objectors, by a joint application, stated that they had arrived at a compromise and asked for mutation to be made in Ramgopal''s name as to 1/3rd, in the names of Tulshi Ram and Munshi Lal as to 1/3rd, and in the name of Duli Chand as to the remaining 1/3rd, and on 3rd May 1924, order was made accordingly. On 6th August 1921 Ramgopal filed a suit against Tulshi Ram, Munshi Lal and Duli Chand, defendants 1, 2 and 3 respectively, claiming the whole property. Duli Chand did not contest the suit but supported the plaintiff''s claim. Munshi Lal, defendant 2, also put in no appearance, but apparently left his brother Tulshi Ram, defendant 1, to contest the suit. Ramgopal''s father''s adoption was again pleaded but was held by both the lower Courts not to have been established. Both Courts, however, held that there had been a family arrangement which was binding, and, therefore, while a decree was passed in favour of the plaintiff as regards the 1/3rd of Duli Chand, the suit was dismissed as regards the 1/8rd which

had been allotted to Tulshi Ram and Munshi Lal. The appeal to this Court came before a single Judge who referred it to a Division Bench and that Bench has referred to this Full Bench the three following questions:

(1) Whether in India, where the Transfer of Property Act is in force, a family arrangement dealing with immovable property of the value of Rs. 100 and upwards, can be effected by an oral contract?

(2) If the oral contract be followed by a joint petition in a mutation Court, containing the terms of the settlement, in the shape of a request to the Court to record the names of the parties in a particular manner, whether that petition, being an unregistered document, may be treated as substantive evidence of the terms of the settlement?

(3) If mutation of names takes place in terms of the joint petition and possession is taken under it, whether before the possession of the defendant has lasted for the space of 12 years, the rightful owner is precluded from claiming the property to which he is entitled, it being assumed that no question of estoppel by conduct arises against him?

2. (This third question we have re-drafted in the form set out by us later at the place where we answer it).

3. The answer to the first question:

Whether in India, where the Transfer of Property Act is in force, a family arrangement dealing with immovable property of the value of Rs. 100 and upwards, can be effected by an oral contract?

depends upon whether a family arrangement may be said to constitute a transfer of property within the meaning of the Transfer of Property Act. Section 9, T.P. Act, lays down that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. The only form of transfer dealt with in the Transfer of Property Act, within the limits of which it can be suggested that a family arrangement comes, is transfer by exchange. Section 118, T.P. Act, says:

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an exchange.

4. We have, therefore, to determine, whether by a family arrangement dealing with immovable property there is any transfer of the ownership in certain property for the ownership of certain other property. It is only necessary to mention some of the cases on this point to which we have been referred. In Trigge v. Lavallee [1863] 15 P.C. 271, it was said that a compromise

is an agreement to put an end to disputes and to terminate or avoid litigation, and in such cases, the consideration which each party receives is the settlement of the

dispute; the real consideration is not the sacrifice of a right but the abandonment of a claim.

5. In Rani Mewa Kunwar v. Rani Hulas Kunwar [1874] 1 I.A. 157, it was said:

The compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is.

6. We may pause here to note that this definition of the basis of a compromise only of course covers cases in which the title to all the property covered by the family arrangement was in doubt. Where any property, in regard to which there was no doubt as between the parties that its ownership rested in one of the parties, is brought within the scope of the family arrangement and is allotted to one of the other parties, it may be that qua that property there would be a transfer of ownership. But no such consideration arises in the present case. In Khunni Lal v. Gobind Krishna [1911] 33 All. 356 their Lordships said at p. 367:

Each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement.

And their Lordships again re-asserted the proposition which we have just quoted from Rani Mewa Kunwar V. Rani Hulas Kunwar [1874] 1 I.A. 157. In Hiran Bibi v. Sohan Bibi AIR 1914 P.C. 44 their Lordships said:

A compromise of this character is, in no sense of the word, an alienation by a limited owner of the family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent and by way of compromise, admitted by the other parties.

7. These pronouncements of their Lordships of the Privy Council are sufficiently clear to put it beyond doubt that in the usual type of family arrangement in which there is no question of any property, the admitted title to which rests in one of the parties, being transferred to one of the other parties, there is no transfer of ownership such as is necessary to bring the transaction within the definition of "exchange" in Section 118, T.P. Act.

8. We hold, therefore, that a binding family arrangement of this type may be made orally.

9. While, however, this is the law, the extreme undesirability, except in the most simple cases, of leaving such an arrangement to be founded on an oral agreement is manifest. Cogent evidence of such an oral agreement would obviously be necessary and any party who is interested in such an agreement being upheld and

yet does not insist upon a written instrument, duly registered where the value. Rs. 100 or upwards, clearly omits to do at his peril.

10. The next question is stated to us as follows:

If the oral contract be followed by a joint petition in a mutation Court, containing the terms of the settlement, in the shape of a request to the Court to record the names of the parties in a particular manner, whether that petition, being an unregistered document, may be treated as substantive evidence of the terms of the settlement.

11. This question states a particular case, one of a type of very frequent occurrence in one form or another. We thought it desirable, therefore, to consider the question in a wider aspect. Having determined that a binding family arrangement may be made by a purely oral agreement we will next consider if the whole or part of the terms of an arrangement, dealing with property of the value of Rs. 100 or upwards, is found to have been put into writing in one form or another, but the writing has not been registered, is the writing admissible in evidence, and if so, for what purposes and to what extent, if at all, is the arrangement binding?

12. We have been referred to a number of cases, but most of them, as is inevitable, deal with a particular set of facts, much as does the particular second question referred to us. As we are, however, of opinion that there is nothing in those cases which conflicts with our view of the law as appearing in Section 91, Evidence Act, and Sections 17 and 49, Registration Act, we do not think it necessary to refer particularly to those cases.

13. Section 91, Evidence Act, declares that

when the terms of a contract... have been reduced to the form of a document... no evidence shall be given in proof of the terms of such contract... except the document itself....

14. The questions arise here:

(1) Does the arrangement amount to a contract?

(2) Was the matter '"reduced to the form a document?"

15. If it was a contract and its terms were reduced to the form of a document, then where the value of the subject-matter was Rs. 100 or upwards, by Section 17, Registration Act, registration was compulsory.

16. By Section 49, Registration Act, no document required by Section 17 to be registered shall, unless it has been registered affect any immovable property comprised therein, or be received as evidence of any transaction affecting such property.

17. That a family arrangement is based on contract we have no doubt. It may be, and no doubt is, a transaction to which certain considerations apply which do not

apply to many other contracts, but it is an agreement enforceable by law and is therefore at least a contract.

18. Whether the terms have been "reduced to the form of a document" is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it was written. For instance:

(a) If the terms were merely quoted in a letter by one party to a friend, this would not constitute a "reduction to the form of a document", a phrase which connotes the idea that the oral agreement is being formally recorded in a document with the intention that it should be evidenced by that document.

(b) If the oral arrangement is followed immediately or after an interval (shorter or longer) by a petition in Court containing a reference to the arrangement (either a mere reference to the fact of there having been an arrangement, or a partial or complete setting out of the terms, with or without a declaration of an acceptance of and intention to be bound by those terms), the question whether the reference was merely for the purpose of informing the Court or was dictated by a desire to make formal record of the arrangement to be evidenced by the documents, will have to be determined on the facts of each case.

19. We emphatically refuse to suggest the weight to be attached to any particular fact. In one case it may be that a statement in such a petition as that we have mentioned in the second instance that we have given, to the effect that the parties have agreed or do agree to be bound by the terms set out, may appear conclusive as indicating their intention that petition should constitute the formal record of the arrangement. In another case it may be that there is independent evidence proving beyond doubt the express intention of the parties that subsequent to that document there should be executed a formal instrument which the parties will duly register, which would show that no final settlement had been arrived at. The value in either case to be attributed to the particular statement may be wholly different. It will be for the Court to consider all the facts striking and important or otherwise and to allot them their due weight.

20. If after weighing all the facts the Court has arrived at the conclusion that the terms of the arrangement were not "reduced to the form of a document" for the purpose of recording the arrangement, then registration would be unnecessary, the document not purporting to declare, etc., any title. It would not, therefore, by virtue of Section 49, Registration Act, be rendered inadmissible in evidence.

21. But, ex hypothesi, not being a document of title, it cannot be used as a document of title; it can only be used as a piece of evidence, e.g., as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct. As to the worth of such a document in evidence we need only say that it is for the Court to determine its worth, but, in view of the absence of a formal

registered instrument where the circumstances are such that a formal instrument might be expected, the admission of the transaction or the conduct evidenced by the document may, in the absence of other evidence, be quite inadequate by itself to prove that the parties had come to a final arrangement intended to be binding on them.

22. If it has been found that the arrangement was reduced to the form of a document for the purpose of formally recording the arrangement and though the value is of Rs. 100 or upwards, it was not registered, the absence of registration makes the documents inadmissible in evidence and is fatal to proof of the arrangement indicated in the document.

23. The third question which was formulated as set out at the beginning of this Judgment may, in the light of the answers already given, be re-stated thus:

Where it has been found that there is no legally binding oral family arrangement, or that the arrangement, though reduced to writing with the intention that the document should be the document of title, cannot be proved for want of registration, and where no question of estoppel arises, can the mere fact that mutation has taken place and that possession has been taken remedy, by virtue of what is known to English law as the doctrine of part performance, the absence of registration.

24. We have to assume for the purpose of answering this question that there is no valid family arrangement which binds the parties and no legal title in law vests without a registered document, and under which possession has been taken; for we have held above that, to effect a family arrangement, under the present law prevailing in India it is not necessary to execute a formal document. Where the family arrangement has been acted upon, by the parties taking possession, in pursuance of it, the question formulated in question No. 3 will never arise. The possession in that case, of a party, would be lawful and no question of "the rightful owner" will ever arise the question therefore presupposes that there is no valid compromise or family arrangement binding on the parties, and yet, by mutual agreement, the parties have taken possession and, after the party who is not legally entitled to the property has been in possession for some time, the rightful owner brings a suit for possession, there being nothing in the whole transaction to estop him from maintaining the suit. The answer to such a question can only be in the negative.

25. The present case is very similar to the case of Chokhey Singh v. Jodh Singh [1909] 31 All 73.

26. In that case, on the decease of a Hindu, his brother and the sons of another brother, who predeceased the deceased made a joint application to the revenue Court in the following language:

Jodh Singh, own brother of the deceased, is in possession of half of the haqqiat of the deceased, and Chokhey Singh and Gajraj Singh in equal shares, after deducting the Jethansi right of Chokhey Singh at the rate of 4 per cent., are in possession of the other half of his share. There is no other legal hair except the deponents. The mutation in respect of the deceased''s share in all the villages should be allowed and nobody has any objection thereto.

27. The Courts in India and the Privy Council found as a fact that, in spite of this application in the revenue Court, there was no evidence which would indicate that there was a compromise between the parties. The application stated that the parties, the brother on the one hand and the nephews on the other, were in possession of the property in equal shares (except a small share given to the uncle by way of Jethan) that they were the only heirs of the deceased and that the property should be recorded accordingly. Their Lordships said that this mutation of names, by itself, conferred no proprietary title In the opinion of their Lordships there was no bar to the plaintiff''s success and the plaintiff did succeed. It is noteworthy that the defendants had set up several pleas to defeat the plaintiff''s title. They were all enquired into and were all decided against the defendants.

28. The principle to be deduced from the case of Chokhey Singh [1909] 31 All 73 is that where there is no binding agreement acknowledging title, the mere fact that the contending parties agreed to divide the property in certain shares, for a time, did not preclude the rightful owner from claiming what was his due, in a Court of justice. The only bar that might arise against the rightful owner would be one of 12 years'' adverse possession. Ex hypothesi there is no such bar in the question we have to answer. As already indicated, our answer therefore should be in the negative. In the course of the argument, the doctrine of part performance was relied upon as being an effective answer to the plaintiff''s claim and we proceed to discuss the same.

29. The doctrine is sought to be applied in this way. It is said that if there be no valid compromise proved, the proceeding amounts to this that the rightful owner agrees, orally, that a part of his property should go to the other party and although a deed of transfer in writing and registered, would be necessary, the defect is cured by the fact that possession is taken under the oral contract.

30. The doctrine of part performance is a doctrine of equity evolved in England under the following circumstances. In the year 1677 the Statute of Frauds was passed in the following language:

Section 4. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made in consideration of marriage, or upon any contract or sale of

lands, tenements or hereditament, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

31. It will be noticed that this law did not nullify the contract. The contract held good. The only obstacle that was created, in the way of the parties to the contract relating to land and other contracts, was that the contract could not be enforced in a Court of justice. Anson in his "Law of Contract" (16tn Edn. 1923) at pp. 88 and 89 says:

It remains to consider what is the position of parties who have entered into a contract specified in Section 4 (Statute of Frauds), but have not complied with the provisions of the section. Such a contract is neither void nor voidable, but it cannot be enforced by action because it is incapable of proof.

32. The result of this enactment was that perfectly good contracts under which parties had taken possession could not be enforced in law. The Courts of equity sought out means to relieve this difficulty on the theory that a statute to guard against fraud should not be allowed to so operate as to encourage fraud. On this theory the Courts of equity held themselves justified in taking up the following position.

33. They said:

Very well, we cannot look into the contract for want of a written document, but there is no bar to a party proving the fact that possession has been taken or something else has been done in pursuance of the contract which is not in writing. We shall allow a party to show how possession came to be changed and in doing so the original contract will be discovered.

34. That this was the view taken of what was termed part performance" will be abundantly clear from the judgment in Maddison v. Alderson [1883] 8 A.C. 467. Even in England the doctrine of part performance was acquiesced in with great reluctance. In the case quoted above, Lord Blackburn at p. 489 remarked that the result of the introduction of the doctrine of part performance has been the addition of the following words to the Statute, viz., "or unless possession of land shall be given and accepted." His Lordship remarked that if the matter had been res integra, he would have refused to interpolate those words, but that the matter was not such, and, he added:

If it was originally an error, it is now, I think, a communis error and so makes the law.

35. It is not necessary to understand the English doctrine of part performance clearly, to quote further cases decided in England on the point. The principal

question which we have to answer is whether this doctrine, which is peculiar to English law, can be introduced in India having regard to its peculiar laws.

36. The case of Mohammad Musa v. Aghore Kumar Ganguli AIR 1914 P.C. 27 has been very often relied on to show that their Lordships of the Privy Council were prepared to extend this doctrine to India. There can be no doubt that their Lordships, in the course of the decision of the case, did mention this doctrine and did say that they did not think that there was anything either in the law of India or England inconsistent with the doctrine laid down in the case of Maddison v. Alderson [1883] A.C. 467 quoted above. But their Lordships did not decide the case on the ground of part performance, and must be understood to have laid down that where writing is necessary for the purpose of proving a contract in a Court of law, the defect of its absence may be cured if that contract has been acted upon, provided the validity of the contract itself did not depend on the writing. That case is as follows:

37. Before the Transfer of Property Act came into force, a certain mortgagee and mortgagor agreed that the mortgage should be extinguished and the mortgagee should become the owner of a part of the mortgaged property. The mortgagor having thus obtained possession over a portion of the mortgaged property, transferred the same. Nobody "questioned the transaction for 30 to 40 years. Then a legal representative of the original mortgagor claimed redemption. The terms of the agreement arrived at between the mortgagor and mortgagee had been incorporated into an application of compromise and had been incorporated in the decree. The High Court of Calcutta were of opinion that the two together were sufficient to establish that the mortgage had been extinguished. Their lordships of the Privy Council themselves said at p. 814 of the report:

It is impossible to read the razinama without concluding that the mortgage debts were to be thence forward for ever extinguished, that the property itself was to be divided among the parties (mortgagor and mortgagee) in specific shares and with regard to one share it was to become, and to be dealt with by Khodajanessa as her separate property disburdened of debt.

38. The compromise was made a rule of the Court and the decree effectually defined the rights of the parties. Their Lordships were pressed with the contention that no written conveyance in favour of the mortgagee had been executed by the mortgagor. Their Lordships pointed out that the transaction took place before the Transfer of Property Act was passed, and no written conveyance was necessary. After having said so, their Lordships proceeded to remark that

even if a transfer in writing had from a conveyancing point of view been omitted

their Lordships were of opinion that fact would have been unavailing to the appellants (plaintiffs). The grounds given were that the compromise had been acted upon and parties had parted with the properties given to them by the compromise.

Leaving aside the ambiguity of the expression "from a conveyancing point" of view it is clear that their Lordships had in mind the requirement of a writing for a transfer and not such stringent provisions as that of a necessity of registration.

39. The question that we have to answer is, whether having regard to the law enacted in the Transfer of Property Act, is it open to say that where a transfer could be effected only by a registered document, the doctrine of part performance can be brought into play in order to establish the transaction without the production of the required document? For example, if two parties agree on an exchange of immovable properties of the value of more than Rs. 100, can it be said that the mere fact that the parties have taken possession of each other''s property, will pass title without a title deed, which must under the law be in writing and registered?

40. We need hardly repeat that in the case of the Statute of Frauds in England, the contract itself is good and valid and passes title. In India no title passes whatsoever, where it is compulsory to have a registered document to pass title. The conditions, therefore, in India and England are not identical. A rule of equity can never be put forward to annul a positive enactment. There may be cases where a plaintiff seeking to recover property over which he has delivered possession to the other party, may be defeated on the ground of personal estoppel, although his title to the land remains intact. But that is because of the personal estoppel and not because the plaintiff has no title, having lost it on account of the doctrine of part performance.

41. Under the United Provinces Tenancy Act of 1901 (now repealed), a mortgage of occupancy holding was declared to be illegal. People, however, were accustomed to make usufructuary mortgages of their occupancy holdings under a misconception of law. Where any such mortgagor brought a suit to recover his occupancy holding from the mortgagee on the ground that the mortgage was illegal, the plaintiff was always granted his relief, but on the equitable condition that he restored the money he had taken from the defendant mortgagee. In a case like this, the plaintiff could succeed only if he was in a position to restore the benefit he had received under the illegal or incomplete transaction. On the other hand, where the plaintiff is not in a position to restore the advantage, the Courts in India, being Courts both of law and equity, would not allow the plaintiff to succeed. To go back to the illustration of an exchange of property without a deed of exchange the properties being worth Rs. 100 or more, let us suppose that the plaintiff has sold away the property which he himself got from the defendant in exchange of his own property. Although for want of a title-deed the defendants'' title is incomplete and he is bound to hand over the property to the rightful owner, the plaintiff, the rightful owner, being unable to return the defendant''s property to him would not be granted my relief. A case like this arose in this Court and is reported in Salamat v. Mashalla [1918] 40 All. 187. Walsh, J., decided the case against the plaintiff on the doctrine of part performance, but the other learned Judge, Piggott, J., held that the plaintiffs; although they could still call themselves the owners of the property, were bound by the agreement not

to eject. The true answer, however, to the plaintiff''s case was that he was not in a position to restore the property. Piggott, J., was not prepared to extend the doctrine of part performance to this country having regard to the law prevailing in India. This case, Salamat v. Mashalla [1918] 40 All. 187, was followed by Walsh and Ryves, JJ., in this Court in the case of Musammat Kunti and Others Vs. Gajraj Tewari reversing a judgment of this Court in a Letters Patent Appeal.

42. So far as this Court is concerned, we have only the views of two learned Judges, Walsh and Ryves, against the views of an equal number of Judges, Piggott and Gokul Prasad, JJ.

43. To go back to the principle governing the doctrine of part performance, we have to see, where there is no personal estoppel against the plaintiff''s success, whether he should be shut out on the ground of ""equities" although those equities might go in the teeth of the law. Under the Bengal, N.W.P. and Assam Civil Courts Act, the Courts in the province of Agra are to act

according to justice, equity and good conscience, where there is no law governing the case. (Section 37).

44. On express enactment, therefore, rules of equity will not come in to override the law.

45. Now we propose to examine cases decided by their Lordships of the Privy Council after the case of Muhammad Musa AIR 1914 P.C. 27. The doctrine of equitable mortgage or mortgage by deposit of title-deeds is essentially a creation of rule of equity and is a part of the doctrine of part performance. Williams in his famous book on Real Property (24th edn. 1926) says at p. 685:

Notwithstanding this stringent provision of the statute of frauds to the contrary, it was held by a Court of Chancery that such a deposit (of title-deeds) even without writing, operated as an equitable mortgage of the estate of the mortgagor in the lands comprised in the deeds.

46. Although this is the state of English law, their Lordships of the Privy Council refused to apply the same, in a case from India. In the case of Mul Raj Khatau v. Vishwanath [1913] 37 Bom. 198 a certain person borrowed money from the defendant and as security, handed over his policy of life insurance to him. A rival creditor, later on, obtained an assignment of the policy by an instrument in writing. The question arose, which of the two creditors had the better title. The High Court of Bombay decided, on appeal from the trial Court, that the party holding the policy had acquired a charge by way of equity over the money payable under it. The Privy Council held that the Bombay High Court were in error and that

the error arose from the learned Judges not having appreciated the positive language of the section''(Section 130, T.P. Act which said that on execution of an instrument in writing the title would pass) which precluded the application in India

of the principles of English law on which they based their decision.

47. In the case of Maung Shwe Co v. Maung Inn AIR 1916 P.C. 139 their Lordships had to consider how far a mortgagee became the owner of the property in pursuance of an agreement of sale but without a sale-deed. The Chief Court at Burma applied the rules of English law and their Lordships remarked:

In the English Courts a contract for sale of real property makes the purchaser the owner in equity of the estate and from this principle it follows that where the rights as to payment of interest on purchase money are not regulated by the terms of the contract the purchaser is deemed to be entitled to the rents and profits of the property as from the time when he did take or could safely have taken possession.... The underlying principle has no application to the sale of real estate in Lower Burma since by Section 54, T.P. Act 1882, it is expressly provided that such a contract creates no interest or charge upon the land.

48. Their Lordships refused to apply the principles of equity prevailing in England in the teeth of positive enactment in India.

49. A very recent case which went up before their Lordships of the Privy Council from the Supreme Court of Ceylon is that of Arseculeratne v. Perera AIR 1928 P.C. 273. It an pears that under the law prevailing in Ceylon, no agreement for sale, transfer of mortgage of land could be effected except in writing, signed and attested by a notary and two witnesses, and by Section 21 no agreement of partnership shall be of force or avail in law" unless it is in writing and signed, and by Section 22 it was enacted that nothing in Section 21 was to exempt any instrument affecting land from being executed and attested as required by Section 2. The parties entered into an agreement of partnership to work a mine. They worked it together for four years and then abandoned it. In a suit for dissolution of partnership and other reliefs the question arose, how far the doctrine of part performance was available to the plaintiff, having regard to the fact that the deed of partnership was unattested. Their Lordships at p. 179 said:

Both the case last cited and the doctrine of part performance have reference to Section 4 of the English Statute of Frauds and as they have no application to the more stringent provisions of Clause 2 of the ordinance by which an agreement as to land not duly attested by a notary and two witnesses is rendered of no force or avail in law.

50. From the later decisions of their Lordships of the Privy Council it would be abundantly clear that by their pronouncement in Mohammad Musa''s case AIR 1914 P.C. 27 their Lordships never meant that the positive rules of law contained, for example, in the Transfer of Property Act, might be overridden by the doctrine of part performance.

51. We do not propose to examine cases decided in other Courts. It would be sufficient to say that on the whole the Madras and Bombay High Courts are of opinion that the doctrine of part performance cannot override the provisions of the Transfer of Property Act as regards sale, mortgage, exchange, gift and lease. In the Calcutta High Court there are a few cases in which countenance has been given to the doctrine of part performance, but on an examination of these cases it will be found that in some of the cases at least the plaintiff could not succeed on grounds of personal estoppel, and the cases could have been decided without calling into aid the doctrine of part performance.

52. We hold that there is no bar to the rightful owner from claiming the property in the circumstances mentioned in the question and that the doctrine of part performance cannot be called into aid by the defendant.

53. We would, therefore, return the reference with a statement of the following general propositions:

With reference to the first question:

(1) A family arrangement can be made orally.

(2) If made orally, there being no document, no question of registration arises.

With reference to the second question:

(3) If though it could have been made orally, it was in fact reduced to the form of a "document", registration (when the value is Rs. 100 and upwards) is necessary.

(4) Whether the terms have been "reduced to the form of a document" is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it was written.

(5) If the terms were not "reduced to the form of a document", registration was not necessary (even though the value is Rs. 100 or upwards); and, while the writing cannot be used as a document of title, it can be used as a piece of evidence for what it may be worth, e.g., as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct.

(6) If the terms were "reduced to the form of a document" and, though the value was Rs. 100 or upwards, it was not registered, the absence of registration makes the document inadmissible in evidence and is fatal to proof of the arrangement embodied in the document.

With reference to the third question:

(7) Where it has been found that there is not legally binding oral family arrangement, or that the arrangement, though reduced to writing with the intention that the document should be the document of title, cannot be proved for want of

registration, and where no question of estoppel arises, the mere facts that mutation has taken place and that possession has been taken cannot remedy, by virtue of what is known to English law as the doctrine of "part performance", the absence of registration.

54. With these answers let the reference be returned.